(4)

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

---

# No. 372

---

ABERT HERMAN NELSON,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

---

WILLIAM B. MAHONEY,
*Counsel for Petitioner.*

JAY T. BARNSDALL, JR.,
*Of Counsel.*

# INDEX.

## Subject Index.



## Table of Cases Cited.



## Statutes Cited.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1944

## No. 372

ABERT HERMAN NELSON,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Abert Herman Nelson, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on July 31st, 1944, affirming a judgment of conviction of the petitioner in the District Court of the United States for the Western District of New York.

### Opinions Below.

1. No opinion was written by the District Court for the Western District of New York.

2. An opinion by the United States Circuit Court of Appeals for the Second Circuit (Judge Swan) was written but has not yet been reported.

## Jurisdiction.

The judgment affirming the conviction of the petitioner, by the Circuit Court of Appeals for the Second Circuit was entered July 31st, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, as well as Rule XI of the Criminal Appeals Rules, promulgated by this Court on May 7th, 1934.

## Questions Presented.

1. Has any Local Board, or any other board, set up under the provisions of the Selective Training and Service Act of 1940 as amended, any right to pass upon the religious opinion of any person registered with and subject to the action of said board?

2. Has any Local Board, or any other board, set up under the provisions of the Selective Training and Service Act of 1940, any right to pass upon the question as to whether the defendant is a minister of religion within the meaning of Selective Service Regulation No. 622.44?

3. Can a registrant be put in such a state of default by the mere mailing of a letter so that he may be sentenced to prison for a crime?

4. Whether the provisions of selective service No. 633.1, which provides in part "That the mailing of any order to a registrant shall constitute notice to him of the contents of the notice *whether he actually receives it or not.*" provides for and constitutes due process of law.

## Statute Involved.

Section 11 of the Selective Training and Service Act of 1940 so far as pertinent, provides:

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the

rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall, upon conviction in the District Court of the United States having jurisdiction thereof be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *."

## Statement.

The defendant was convicted, before the United States District Court, Western District of New York of a violation of the Selective Training and Service Act of 1940. The specific charge was that he failed to report to his local board as ordered. The present appeal is from that conviction. The defendant is a "regular minister of religion", of the sect known as Jehovah's Witnesses, within the meaning of Section 622.44, Subd. (B) of the Selective Service Regulations. As such minister he was entitled to be placed in class IV-D, and was exempt from service of any kind. The local Selective Service Board attempted to determine whether he was a "regular minister" or not. This board decided that he was not a "regular minister" and put him in a class other than IV-D, and thereby made him liable for service. Under this conviction the defendant was sentenced to serve a term in Federal Prison.

The defendant appealed from this conviction and the conviction was affirmed by the United States Circuit Court of Appeals, Second Circuit on June 30th, 1944.

## Specification of Errors to Be Urged.

The District Court erred:

1. In holding that a Selective Service System Board had authority to pass upon the appellant's claim to be a minister of religion.

2. The District Court erred in holding that the appellant questioned the correctness of the board's classification, when in fact the appellant really challenged the authority of the board to make any classification.

3. The District Court erred in holding that the appellant had been properly notified to report.

**Reasons for Granting the Writ.**

I.

We have apparently three conflicting decisions by the United States Supreme Court concerning the main question in this case.

1. In the matter of *Nick Falbo* against *United States of America*, reported at 320 U. S. 549, the court apparently held that not only had a selective service board the right to decide a religious matter, to wit, whether the appellant was a minister of religion, but also held that the courts had no right to review said determination of a board.

2. In the case of *The West Virginia State Board of Education* against *Barnette*, reported at 319 U. S. 624, the court held in effect that no board or official had a right to pass upon a matter involving religious opinions, which of course includes the opinion as to who is or is not a minister of religion. The court said in part as follows:

"The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and *officials* and to establish them as legal principles *to be applied by the courts.*

"If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other

matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

The above decision was rendered in 1943, during the present war. The United States Supreme Court at that time was well aware of the Selective Training and Service Act of 1940. It held, nevertheless, that it knew of no circumstances which permitted an exception to the above rule.

It is perfectly clear, from the above decision, that no person, other than the courts had any right to pass upon the claim of the defendant to be a minister of religion and therefore exempt from all service. Until the courts had passed on, and denied that claim, the Selective Service System Board had no authority to order him to report. On this point alone, the conviction must be reversed.

3. In the case of *The United States of America* against *Ballard*, reported at 64 Supreme Court Reporter, Page 882, the Supreme Court held in effect that no court had any right to pass upon the truth or falsity of the religious beliefs of any sect. The court held in effect "Men may believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs. When the triers of fact undertake that task, they enter forbidden domain." Of course, one of the most important points of any religious sect is the question as to who is or is not a priest or a minister of that sect. It is the individual right of each person to regard whom he pleases as his clergyman or his priest. When the court attempts to pass on the question as to who is a clergyman or a priest it attempts to substitute its judgment for that of the individual. This may not be done in The United States of America.

II.

As above stated we now have three conflicting opinions from The United States Supreme Court on the same subject. They may be briefly stated as follows:

A. No board or official may pass upon a religious question. Only the court can pass upon these questions. (*Barnette* case)

B. A Selective Service System Board can pass upon religious questions and its decisions cannot be reviewed in Court. (*Falbo* case)

C. No court can pass upon or review a religious question. (*Ballard* case)

In view of these three highly contradictory decisions it is very important that the court hand down a decision in the present case indicating exactly what it means on the questions involved. No one can read these three conflicting decisions and have anything but doubt as to what the law is.

**Conclusion.**

For the reasons stated, the writ should issue as herein prayed.

August 1st, 1944.

ABERT HERMAN NELSON,
*Appellant.*

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Abert Herman Nelson, being duly sworn deposes and says:

That he is the appellant named in the foregoing petition and the same is true to his own knowledge except as to the

matters as therein stated to be alleged on information or belief and that as to those matters, he believes them to be true.

ABERT HERMAN NELSON.

Sworn to before me this 1st day of August, 1944.

GRACE E. JOHNSTON,
*Commissioner of Deeds,*
*Buffalo, New York.*

WILLIAM B. MAHONEY,
*Counsel for Petitioner,*
*405 Walbridge Building,*
*Buffalo, New York.*

Of Counsel:
JAY T. BARNSDALL, JR.,
*304 Underhill Building,*
*Buffalo, New York.*